EXHIBIT H

LEXSEE 385 F3D 1202

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ADRIAN ORTIZ-LOPEZ, Defendant-Appellant.

No. 03-10339

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

385 F.3d 1202*; *2004 U.S. App. LEXIS 20865

May 11, 2004, Argued and Submitted, San Francisco, California
October 6, 2004, Filed

PRIOR HISTORY: [**1] Appeal from the United States District Court for the District of Nevada. D.C. No. CR-02-00411-LRH. Larry R. Hicks, District Judge, Presiding.

DISPOSITION: Reversed and remanded.

COUNSEL: Jason F. Carr, Assistant Federal Public Defender, Las Vegas, Nevada, for the defendant-appellant.

Robert A. Bork, Assistant United States Attorney, Las Vegas, Nevada, for the plaintiff-appellee.

JUDGES: Before: Betty Binns Fletcher, Stephen S. Trott and Raymond C. Fisher, Circuit Judges.

OPINION

[*1203] PER CURIAM:

Adrian Ortiz-Lopez challenges his conviction under *8 U.S.C. § 1326* for illegal reentry into the United States following removal. He bases his challenge on a collateral attack on the underlying removal. Ortiz-Lopez argues, and the government agrees, that in his removal proceeding the Immigration Judge ("IJ") did not inform him that he was eligible for a fast-track voluntary departure under *8 U.S.C. § 1229c(a)(1)*. We conclude that the district court erred in finding that because Ortiz-Lopez's previous California conviction for cocaine possession was an "aggravated felony," Ortiz-Lopez could not have been prejudiced by the IJ's failure to inform him about relief from [**2] removal. We reverse and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Ortiz-Lopez is a Mexican national who first entered the United States without admission or parole in 1994. On April 25, 2000, he was convicted in San Mateo County, California, for felony possession of a controlled substance, a violation of *Cal. Health & Safety Code § 11350(a)*. His California conviction was based on possession of cocaine. Shortly thereafter, Ortiz-Lopez received a notice to appear from the then-Immigration and Naturalization Service ("INS"), charging him with being removable from the United States for being an alien present without being admitted or paroled, and as an alien convicted of a controlled substance violation. *See 8 U.S.C. § 1182(a)(6)(A)(i)*; *8 U.S.C. § 1182(a)(2)(A)(i)(II)*.

On May 8, 2000, Ortiz-Lopez received a hearing before an IJ. The IJ did not inform Ortiz-Lopez that he was eligible for any form of relief from removal, including voluntary departure from the United States. The IJ ordered Ortiz-Lopez removed from the United States. Ortiz-Lopez waived his right to appeal.

Sometime [**3] thereafter, Ortiz-Lopez reentered the United States. In July 2002, the government indicted Ortiz-Lopez on a single count of unlawful reentry following removal in violation of *8 U.S.C. § 1326*. Ortiz-Lopez moved to dismiss the indictment based on constitutional defects in the underlying removal proceeding. The district court adopted a magistrate judge's recommendation that the motion to dismiss be denied. In February 2003, Ortiz-Lopez entered a conditional guilty plea, preserving the right to appeal the ruling on the motion to dismiss, and thereafter timely appealed.

JURISDICTION AND STANDARD OF REVIEW

We "review de novo a claim that defects in the underlying deportation procedure invalidated the proceeding for use in . . . criminal proceedings." *United States v. Garcia-Martinez, 228 F.3d 956, 960 (2000)* (internal quotation marks omitted). We have jurisdiction under *28 U.S.C. § 1291*.

DISCUSSION

A defendant charged with illegal reentry after removal under *8 U.S.C. § 1326* may collaterally attack the removal order. *United States v. Mendoza-Lopez, 481 U.S. 828, 837-38, 95 L. Ed. 2d 772, 107 S. Ct. 2148 (1987).* [**4] In order to sustain a collateral attack, a defendant must show (1) that he exhausted all administrative remedies available to him to appeal his removal order, (2) that the underlying removal proceedings at which the order was issued "improperly deprived [him] of the opportunity for judicial review" and (3) [*1204] that "the entry of the order was fundamentally unfair." *8 U.S.C. § 1326(d)*. "An underlying removal order is fundamentally unfair if: (1) [an alien's] due process rights were violated by defects in the underlying deportation proceeding, and (2) he suffered prejudice as a result of the defects." *United States v. Ubaldo-Figueroa, 364 F.3d 1042, 1048 (9th Cir. 2004)* (internal quotation marks omitted).

Ortiz-Lopez correctly argues that his due process rights were violated in the underlying deportation proceeding because the IJ failed to inform him that he was eligible for a fast-track voluntary departure in lieu of removal, under *8 U.S.C. § 1229c(a)*. [1] Accordingly, Ortiz-Lopez will have met all of the requirements for a successful collateral attack on his *§ 1326* conviction -- provided he can show that he could in fact [**5] have received voluntary departure under *§ 1229c(a)* at the time of his removal hearing. [2] *See Ubaldo-Figueroa, 364 F.3d at 1050* ("The requirement that the IJ inform an alien of his or her ability to apply for relief from removal is mandatory, and failure to so inform the alien of his or her eligibility for relief from removal is a denial of due process that invalidates the underlying deportation proceeding.") (internal quotation marks omitted); *see also United States v. Arrieta, 224 F.3d 1076 at 1079* (holding that a due process violation arose when the IJ had not per-formed its mandatory obligation to inform defendant of his eligibility for relief from deportation). The government does not argue otherwise.

1 *Section 1229c(a)*, states that

> The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense under this subsection, in lieu of being subject to proceedings under section 1229a of this title or prior to the completion of such proceedings, if the alien is not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4)(B) of this title.

This provision was enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), and permits "fast-track" voluntary departure prior to the completion of removal proceedings to aliens who comply with the statutory and regulatory requirements. *See In re Cordova, 22 I. & N. Dec. 966, 967 (BIA 1999)* (en banc). Of course, if Ortiz-Lopez had departed voluntarily instead of being removed, he would not now be liable under *8 U.S.C. § 1326* for illegal reentry following removal, because he would never have been removed.

[**6]

2 Ortiz-Lopez waived his right to appeal his removal to the BIA. If he were eligible for voluntary departure under *§ 1229c(a)*, however, he would be "exempted from the exhaustion requirement . . . because the IJ did not inform him that he was eligible for relief from [removal]." *Ubaldo-Figueroa, 364 F.3d at 1049*. Waiver of appeal must be considered and intelligent, and "we do not consider an alien's waiver of his right to appeal his deportation order to be considered and intelligent when the record contains an inference that the petitioner is eligible for relief from deportation, but the [IJ] fails to advise the alien of this possibility and give him the opportunity to develop the issue." *Id. at 1049* (internal quotation marks omitted). Moreover, Ortiz-Lopez would have been deprived of the right to judicial review, because "an alien who is not made aware that he has a right to seek relief necessarily has no meaningful opportunity to appeal the fact that he was not advised of that right." *United States v. Arrieta, 224 F.3d 1076,*

1079 (9th Cir. 2000) (finding a deprivation of judicial review where an alien was not informed of the right to seek relief from deportation).

[**7] The district court, however, found that Ortiz-Lopez could not have been eligible for voluntary departure because of his prior California conviction for the possession of a controlled substance. Ortiz-Lopez's conviction under *California Health & Safety Code § 11350(a)* was his first conviction for possession of a controlled substance, and he received a 60-day sentence [*1205] and three years probation. The district court considered this to be an "aggravated" felony automatically barring relief from removal under *8 U.S.C. § 1229c.* 3

3 Relief from removal under *§ 1229c(a)* is categorically barred to two classes of aliens: those involved in terrorism-related activity (not at issue here), and those "deportable under *section 1227(a)(2)(A)(iii)*," which in turn means those "convicted of an aggravated felony at any time after admission." *8 U.S.C. § 1229c(a)*; *§ 1227(a)(2)(A)(iii)*. An "aggravated felony" includes "illicit trafficking in a controlled substance . . . including a drug trafficking crime." *8 U.S.C. § 1101(a)(43)(B)*. "Drug trafficking crime," in turn, is defined as any felony punishable under various con-trolled substances acts. *18 U.S.C. § 924(c)(2)*.

[**8] Although possession of a controlled substance such as cocaine is designated as a felony under California law, under federal law a first-time conviction for possession of a controlled substance like cocaine is not a felony because it carries a sentence of under one year. *21 U.S.C. § 844(a)*; *see United States v. Arellano-Torres, 303 F.3d 1173, 1177-78 (9th Cir. 2002)*. We have recently held that "a state drug offense is not an aggravated felony for immigration purposes unless it would be punishable as a felony under the . . . federal drug laws . . . or is a crime involving a trafficking element". *Cazarez-Gutierrez v. Ashcroft, 382 F.3d 905, 2004 U.S. App. LEXIS 17947, 2004 WL 1879240 (9th Cir. Aug. 24, 2004)* (holding that a similar state drug possession offense that was not a felony under federal law could not be an aggravated felony for immigration purposes). Under *Cazarez-Gutierrez*, it is clear that Ortiz-Lopez's prior conviction was not an aggravated felony in the relevant sense.

Moreover, it was clear under Board of Immigration Appeals precedent that governed the IJ at the time of Ortiz-Lopez's removal hearing that only a federal felony could constitute [**9] a "drug trafficking crime" that qualifies as an "aggravated felony" under *§ 1229c(a)*. *See In re K-V-D-, 22 I. & N. Dec. 1163 (BIA 1999)* (en banc). Thus, Ortiz-Lopez would not have been automatically barred from relief from removal due to his California cocaine possession conviction had he appealed to the BIA after his removal hearing.

The government argues that no IJ would have allowed Ortiz-Lopez to depart voluntarily as a discretionary matter under *§ 1229c(a)*, regardless of whether his cocaine possession conviction was an aggravated felony. As the government concedes, however, the district court should consider this argument in the first instance. *See United States v. Lopez-Vasquez, 1 F.3d 751, 756 (9th Cir. 1993)* (remanding for further consideration of the prejudice issue); *United States v. Leon-Paz, 340 F.3d 1003, 1007 (9th Cir. 2003)* (same). We therefore remand this case to the district court, where the government may present evidence "to demonstrate that the procedural violation could not have changed the proceedings' outcome." *United States v. Gonzalez-Valerio, 342 F.3d 1051, 1054 (9th Cir. 2003)*.

REVERSED [**10] **and REMANDED.**

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EXHIBIT I

CODE OF FEDERAL REGULATIONS
TITLE 8--ALIENS AND NATIONALITY
CHAPTER V--EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, DEPARTMENT OF JUSTICE
SUBCHAPTER A--GENERAL PROVISIONS
PART 1003--EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
SUBPART C--IMMIGRATION COURT--RULES OF PROCEDURE

Current through December 28, 2005; 70 FR 76935

§ 1003.25 Form of the proceeding.

(a) Waiver of presence of the parties. The Immigration Judge may, for good cause, and consistent with section 240(b) of the Act, waive the presence of the alien at a hearing when the alien is represented or when the alien is a minor child at least one of whose parents or whose legal guardian is present. When it is impracticable by reason of an alien's mental incompetency for the alien to be present, the presence of the alien may be waived provided that the alien is represented at the hearing by an attorney or legal representative, a near relative, legal guardian, or friend.

(b) Stipulated request for order; waiver of hearing. An Immigration Judge may enter an order of deportation, exclusion or **removal stipulated** to by the alien (or the alien's representative) and the Service. The Immigration Judge may enter such an order without a hearing and in the absence of the parties based on a review of the charging document, the written stipulation, and supporting documents, if any. If the alien is unrepresented, the Immigration Judge must determine that the alien's waiver is voluntary, knowing, and intelligent. The stipulated request and required waivers shall be signed on behalf of the government and by the alien and his or her attorney or representative, if any. The attorney or representative shall file a Notice of Appearance in accordance with § 1003.16(b). A stipulated order shall constitute a conclusive determination of the alien's deportability or removability from the United States. The stipulation shall include:

(1) An admission that all factual allegations contained in the charging document are true and correct as written;

(2) A concession of deportability or inadmissibility as charged;

(3) A statement that the alien makes no application for relief under the Act;

(4) A designation of a country for deportation or removal under section 241(b)(2)(A)(i) of the Act;

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(5) A concession to the introduction of the written stipulation of the alien as an exhibit to the Record of Proceeding;

(6) A statement that the alien understands the consequences of the stipulated request and that the alien enters the request voluntarily, knowingly, and intelligently;

(7) A statement that the alien will accept a written order for his or her deportation, exclusion or removal as a final disposition of the proceedings; and

(8) A waiver of appeal of the written order of deportation or removal.

(c) Telephonic or video hearings. An Immigration Judge may conduct hearings through video conference to the same extent as he or she may conduct hearings in person. An Immigration Judge may also conduct a hearing through a telephone conference, but an evidentiary hearing on the merits may only be conducted through a telephone conference with the consent of the alien involved after the alien has been advised of the right to proceed in person or, where available, through a video conference, except that credible fear determinations may be reviewed by the Immigration Judge through a telephone conference without the consent of the alien.

[57 FR 11571, April 6, 1992; 59 FR 1899, Jan. 13, 1994; 60 FR 26353, May 17, 1995; 62 FR 10334, March 6, 1997]

8 C. F. R. § 1003.25

8 CFR § 1003.25

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EXHIBIT J

RULES and REGULATIONS

DEPARTMENT OF JUSTICE

8 CFR Part 3

[EOIR No. 103F; AG Order No. 1966-95]

RIN 1125-AA03

Executive Office for Immigration Review; Stipulated Requests for Deportation or Exclusion Orders, Telephonic, Video Electronic Media Hearings

Wednesday, May 17, 1995

- go to page 3

*26351 AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: This final rule amends 8 CFR 3.25 by codifying an Immigration Judge's discretion to enter an order of deportation or exclusion without a hearing if satisfied that the alien voluntarily entered into a plea-negotiated or otherwise stipulated request for an order of deportation or exclusion. It further codifies the practice of Immigration Judges conducting telephonic hearings in deportation, exclusion, or recission cases, and codifies the authority of the Immigration Judge to hold video electronic media hearings.

The proposed rule also clarifies the language in §3.25(a) to conform with in absentia hearing provisions under the Immigration and Nationality Act (the "Act"), 8 U.S.C. 1252, 1252b.

EFFECTIVE DATE: June 16, 1995.

FOR FURTHER INFORMATION CONTACT:

Gerald S. Hurwitz, Counsel to the Director, Executive Office for Immigration Review, suite 2400, 5107 Leesburg Pike, Falls Church, Virginia 22041 (703) 305-

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0470.

SUPPLEMENTARY INFORMATION: The Department of Justice published a proposed rule on May 13, 1994 (59 FR 24976). The proposed rule sought to amend §3.25 of title 8, CFR, to require an Immigration Judge to enter an order of deportation or exclusion on the written record, without an in-person hearing, based upon the stipulated written request of the respondent/applicant and the government under certain specified circumstances. The requirement to enter orders of deportation or exclusion based on the written record would arise only in instances where the Immigration Judge determined that the charging document set forth a valid basis for deportability or excludability; the stipulated request for an order of deportation or exclusion was voluntarily entered into by the respondent/applicant; and the respondent/applicant specifically waived relief from deportation or exclusion as well as the described hearing rights.

The rule also proposed to establish the authority of the Immigration Judge to hold telephonic hearings and video electronic media hearings. Additionally, the proposed rule made minor technical changes in paragraph (a) to conform with the in absentia provisions of 8 U.S.C. 1252.

The Executive Office for Immigration Review ("EOIR" or "the Agency") received eighteen comments concerning the proposed rule. The comments addressed the waiver of presence of the parties, the requirement that an Immigration Judge enter stipulated orders of deportation and exclusion under certain circumstances, and an Immigration Judge's discretion to conduct telephonic and video electronic media hearings.

1. Section 3.25(a) Waiver of Presence of the Parties

The Agency received one comment objecting to the proposed rule's provision allowing the Immigration Judge to waive the presence of an alien who is a child where a parent or legal guardian is present. The commenter argued that the rule would provide children with less due process protection than it provides adults.

This rule is for the convenience of the parties. For example, if parents and their infant child are in deportation proceedings, this rule allows the Immigration Judge to waive the presence of the infant. Such a waiver allows parents to place the child in childcare during the hearing. The waiver allows the parents and the Immigration Judge to concentrate on the substantive issues. For pragmatic reasons, the Agency has decided to retain this rule.

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2. Section 3.25(b) Stipulated Request for Deportation or Exclusion Orders

Numerous commenters expressed due process concerns with the proposed rule's provision requiring an Immigration Judge to enter an order of deportation or exclusion if, based on the written record, the Judge determines that a represented respondent/applicant voluntarily entered into a stipulated request for an order of deportation or exclusion. Conversely, other commenters expressed approval of the requirement and suggested that the Agency expand the requirement to include motions for changes of venue and some forms of relief. Commenters also expressed concern that the rule requiring that a respondent/applicant make no application for relief unjustly limits the options of the respondent/applicant.

The rule has been modified to respond to the commenters' due process concerns. The final rule does not require an Immigration Judge to enter an order of deportation or exclusion based on the parties' written **stipulation**. stead, the rule explicitly recognizes a Judge's discretion to enter an order of deportation or exclusion based on the parties' written **stipulation**. The Immigration Judge's discretion to enter an order by written **stipulation** in the absence of the parties is limited to cases in which the applicant or respondent is represented at the time of the **stipulation** and where the **stipulation** is signed on behalf of the government and by both the applicant or respondent and his or her **attorney** or other representative qualified under part 292 of this chapter. At this juncture, the Agency declines to modify the scope of the **stipulation** procedure, and so the final rule does not address venue and has not changed with respect to application for relief.

Commenters stated that the proposed rule did not give sufficient emphasis to the requirement that only represented respondents/applicants may enter into stipulation requests. In response, the word "represented" has been inserted before each reference to respondent/applicant in the final version of § 3.25(b).

Commenters stated that the proposed rule did not give sufficient emphasis to the requirement that the respondent/applicant fully understand the ramifications of a stipulation. In ascertaining the extent of understanding, one commenter suggested that the Immigration Judge should focus specifically on the respondent/applicant's English language skills. The words "voluntarily, ***26352** knowingly and intelligently" have been added to ensure maximum protection for aliens entering into stipulations. Because language skills are subsumed in the voluntarily, knowingly and intelligently formula, the Agency considers it unnecessary for the rule to specifically address language skills.

One commenter, although supporting the rule's concept, expressed a technical

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concern with the elimination of "hearings" when the requirements for a stipulated deportation or exclusion are met. According to the comment, there is a statutory mandate that Immigration Judge conduct "hearings". In response to this comment, the final rule now states that the Immigration Judge may "conduct hearings in the absence of the parties."

A few commenters stated, in essence, that the requirement that the respondent/applicant introduce written statements as an exhibit to the record of proceedings was superfluous. The commenters suggested deletion of this requirement. Because of the potential value of a complete record, the Agency rejects this suggestion.

One commenter suggested that the rule should explicitly permit revocation of stipulated deportations and exclusions. Because the Code of Federal Regulations already provides mechanisms for motions to reopen, motions to reconsider, and notices of appeal, e.g., 8 CFR 103.5, 208.19, 242.21, 242.22, and 3.3, a revocation provision would be redundant and potentially confusing.

The rule implements the statutory requirement of expeditious deportation of criminal aliens under 8 U.S.C. 1252(i), 1252a(d), while protecting the rights of the parties. The rule contemplates employing stipulated deportations to expedite departures of aliens convicted of offenses rendering them immediately deportable or excludable. Stipulated deportations also allow the prompt departure of imprisoned criminal aliens who have no apparent avenue of relief from deportation or exclusion and who wish to avoid immigration-related detention after having completed their criminal sentences. If used more widely by litigants and criminal prosecutors, the procedure could alleviate overcrowded federal, state, and local detention facilities and eliminate the need to calendar such uncontested cases on crowded Immigration Court dockets.

The procedure is not limited to cases arising in the criminal context and can be used in other appropriate settings. The practice codified by the final rule already exists in some jurisdictions. The final rule promotes judicial efficiency in uncontested cases and resolves the commenters' due process concerns.

3. Section 3.25(c) Telephonic or Video Electronic Media Hearing

Commenters raised both statutory and practical concerns with this section of the proposed rule. The statutory concerns revolved around the proper construction of the phrase "before a special inquiry officer" as used in 8 U.S.C. 1252(b).

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EXHIBIT K

§ 1229c. Voluntary departure

[INA § 240B]

(a) Certain conditions

(1) In general

The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense under this subsection, in lieu of being subject to proceedings under section 1229a of this title or prior to the completion of such proceedings, if the alien is not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4)(B) of this title.

↳ see Ortiz-Lopez

(2) Period

(A) In general

Subject to subparagraph (B), permission to depart voluntarily under this subsection shall not be valid for a period exceeding 120 days.

(B) Three-year pilot program waiver

During the period October 1, 2000, through September 30, 2003, and subject to subparagraphs (C) and (D)(ii), the Attorney General may, in the discretion of the Attorney General for humanitarian purposes, waive application of subparagraph (A) in the case of an alien—

(i) who was admitted to the United States as a nonimmigrant visitor (described in section 1101(a)(15)(B) of this title) under the provisions of the visa waiver pilot program established pursuant to section 1187 of this title, seeks the waiver for the purpose of continuing to receive medical treatment in the United States from a physician associated with a health care facility, and submits to the Attorney General

(I) a detailed diagnosis statement from the physician, which includes the treatment being sought and the expected time period the alien will be required to remain in the United States;

(II) a statement from the health care facility containing an assurance that the alien's treatment is not being paid through any Federal or State public health assistance, that the alien's account has no outstanding balance, and that such facility will notify the Service when the alien is released or treatment is terminated; and

(III) evidence of financial ability to support the alien's day-to-day expenses while in the United States (including the expenses of any family member described in clause (ii)) and evidence that any such alien or family member is not receiving any form of public assistance; or

(ii) who—

(I) is a spouse, parent, brother, sister, son, daughter, or other family member of a principal alien described in clause (i); and

(II) entered the United States accompanying, and with the same status as, such principal alien.

(C) Waiver limitations

(i) Waivers under subparagraph (B) may be granted only upon a request submitted by a Service district office to Service headquarters.

(ii) Not more than 300 waivers may be granted for any fiscal year for a principal alien under subparagraph (B)(i).

(iii)(I) Except as provided in subclause (II), in the case of each principal alien described in subparagraph (B)(i) not more than one adult may be granted a waiver under subparagraph (B)(ii).

(II) Not more than two adults may be granted a waiver under subparagraph (b)(ii) in a case in which—

(aa) the principal alien described in subparagraph (B)(i) is a dependent under the age of 18; or

(bb) one such adult is age 55 or older or is physically handicapped.

(D) Report to Congress; suspension of waiver authority

(i) Not later than March 30 of each year, the Commissioner shall submit to the Congress an annual report regarding all waivers granted under subparagraph (B) during the preceding fiscal year.

(ii) Notwithstanding any other provision of law, the authority of the Attorney General under subparagraph (B) shall be suspended during any period in which an annual report under clause (i) is past due and has not been submitted.

(3) Bond

The Attorney General may require an alien permitted to depart voluntarily under this subsection to post a voluntary departure bond, to be surrendered upon proof that the alien has departed the United States within the time specified.

(4) Treatment of aliens arriving in the United States

In the case of an alien who is arriving in the United States and with respect to whom proceedings under section 1229a of this title are (or would otherwise be) initiated at the time of such alien's arrival, paragraph (1) shall not apply. Nothing in this paragraph shall be construed as preventing

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(b) At conclusion of proceedings

(1) In general

The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense if, at the conclusion of a proceeding under section 1229a of this title, the immigration judge enters an order granting voluntary departure in lieu of removal and finds that—

(A) the alien has been physically present in the United States for a period of at least one year immediately preceding the date the notice to appear was served under section 1229(a) of this title;

(B) the alien is, and has been, a person of good moral character for at least 5 years immediately preceding the alien's application for voluntary departure;

(C) the alien is not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4) of this title; and

(D) the alien has established by clear and convincing evidence that the alien has the means to depart the United States and intends to do so.

(2) Period

Permission to depart voluntarily under this subsection shall not be valid for a period exceeding 60 days.

(3) Bond

An alien permitted to depart voluntarily under this subsection shall be required to post a voluntary departure bond, in an amount necessary to ensure that the alien will depart, to be surrendered upon proof that the alien has departed the United States within the time specified.

(c) Aliens not eligible

The Attorney General shall not permit an alien to depart voluntarily under this section if the alien was previously permitted to so depart after having been found inadmissible under section 1182(a)(6)(A) of this title.

(d) Civil penalty for failure to depart

If an alien is permitted to depart voluntarily under this section and fails voluntarily to depart the United States within the time period specified, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and be ineligible for a period of 10 years for any further relief under this section and sections 1229b, 1255, 1258, and 1259 of this title. The order permitting the alien to depart voluntarily shall inform the alien of the penalties under this subsection.

(e) Additional conditions

The Attorney General may by regulation limit eligibility for voluntary departure under this section for any class or classes of aliens. No court may review any regulation issued under this subsection.

(f) Judicial review

No court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure under subsection (b) of this section, nor shall any court order a stay of an alien's removal pending consideration of any claim with respect to voluntary departure.

(June 27, 1952, c. 477, Title II, ch. 4, § 240B, as added Sept. 30, 1996, Pub.L. 104–208, Div. C, Title III, § 304(a)(3), 110 Stat. 3009–596, and amended Nov. 1, 2000, Pub.L. 106–406, § 2, 114 Stat. 1755.)

HISTORICAL AND STATUTORY NOTES

Effective and Applicability Provisions

1996 Acts. Section effective, with certain exceptions and subject to certain transitional rules, on the first day of the first month beginning more than 180 days after Sept. 30, 1996, see section 309 of Pub.L. 104–208, set out as a note under section 1101 of this title.

Severability of Provisions

If any provision of Division C of Pub.L. 104–208 or the application of such provision to any person or circumstances is held to be unconstitutional, the remainder of Division C of Pub.L. 104–208 and the application of the provisions of Division C of Pub.L. 104–208 to any person or circumstance not to be affected thereby, see section 1(e) of Pub.L. 104–208, set out as a note under section 1101 of this title.

AMERICAN LAW REPORTS

Right of alien who is under deportation proceedings to depart voluntarily from United States, under § 244(e) of Immigration and Nationality Act (8 USCA § 1254(e)). 44 ALR Fed 574.

LIBRARY REFERENCES

American Digest System

Aliens ⚟53.10(1), 54.3(1)

Encyclopedias

C.J.S. Aliens §§ 128 to 130, 210, 211, 225 to 233.

WESTLAW ELECTRONIC RESEARCH

Aliens cases: 24k[add key number].

See WESTLAW guide following the Explanation pages of this volume.

§ 1230. Records of admission

[INA § 240c]

(a) The Attorney General shall cause to be filed, as a record of admission of each immigrant, the immigrant visa required by section 1201(e) of this title to